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SUBJECT: DEMARCHE ON LIABILITY AND REDRESS UNDER THE
CARTAGENA PROTOCOL ON BIOSAFETY

This is an action request. See para 8.

¶1. SUMMARY. On February 23-27 in Mexico City the Group of the Friends of the Co-Chairs Concerning Liability and Redress in the Context of the Cartagena Protocol on Biosafety (the "Group") will meet to continue negotiations on the text of proposed rules on liability and redress for damage resulting from the cross-border movement of living modified organisms (LMOs) as called for by Article 27 of the Protocol. Depending on the final text, these rules could severely impact world trade in biotech-based commodities if options imposing risk and uncertainty on exporters are adopted. As a non-party, the United States may only participate in the meeting as an observer, but will seek to influence the outcome of these negotiations through discussions with member delegations. In preparation for this meeting, posts are requested to report on host government positions' on key elements of the proposed agreement by February 13 and to solicit support for a more balanced proposal. Please see full action request in paragraph 8. END SUMMARY.

¶2. The February meeting may finalize the text on liability and redress set for adoption at the fifth Meeting of the Parties to the Cartagena Protocol on Biosafety (COP-MOP 5) to be held in Nagoya, Japan, on October 11-15, 2010. A supplementary agreement to the Convention on Biological Diversity, the Cartagena Protocol on Biosafety (CPB) is a multilateral environmental agreement that regulates the transboundary movement of LMOs (organisms, including crops that have been genetically engineered and can replicate in the environment).

¶3. Experience to date with the transboundary movement of LMOs shows no damage to biodiversity has been observed after more than a decade of commercialization of the technology. The U.S. maintains that no new rules are needed to specifically cover this area. However, the Parties to the CPB remain intent on developing some type of instrument or instruments. Of particular concern are draft provisions that would treat trade of LMOs as an inherently ultra-hazardous activity requiring an operator to be held strictly liable if damage, broadly defined, results from this activity.

¶4. The current text does not limit itself to biodiversity damage, but includes coverage of pure economic harm, socio-economic harm and harm to human health. If adopted and enforced in national legislation, a system of redress for such a broad range

of damage could have a severe impact on trade in LMOs. In addition, draft provisions mandating the use of financial securities (e.g. insurance) to backstop specifically for "damage" as defined by the instrument is of concern.

15. While the United States is not a Party to the CPB we are the largest exporter of LMOs in the world. Decisions taken at the meeting could have a direct impact on our multi-billion dollar grain and seed trade, particularly in corn, soybeans and cotton. At risk is the financial security and global market access of U.S. technology providers, producers, exporters and shippers of bulk commodities and seeds -- trade which totaled almost \$25 billion in exports in 2007.

16. Key Issues

Among the key issues on which agreement has yet to be reached are:

-- Definition of Damage. The USG supports a narrow definition limited to damage to biodiversity. The USG does not/not support extending the definition of damage to areas beyond the scope of the CPB or its parent Convention (the CBD). These areas include harm to human health, pure economic harm, socioeconomic or cultural harm.

-- Definition of Operator. The U.S. supports a definition of operator that is limited to the entity in control of the LMO at the time the activity causing the damage occurs.

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-- Standard of Liability (Strict versus Fault-Based). The USG prefers fault-based liability for the movement of LMOs. The transboundary movement of LMOs is not an inherently "ultra-hazardous" (a term reserved for materials so hazardous that damage will result from exposure; i.e. radioactive waste) activity. A fault-based standard will ensure that the entity (shipper, exporter, or importer) with control of the LMO has the proper incentive to protect against inadvertent release of the LMO into the environment.

-- Financial security. The USG does not/not support the mandatory use of insurance or other financial instruments for shipments of LMOs the added costs of providing such guarantees are not merited given the low level of risk posed by LMOs.

-- Binding vs. non-binding. The USG supports outcomes that are flexible enough so that governments may implement them within existing legal systems. The rules should specifically not reinvent standard domestic legal practice with respect to recognition of foreign judgments, standing to bring a case, and jurisdiction. The Parties have apparently settled on pursuing development of a binding "administrative approach" system and a non-binding civil liability system. While the USG has little ability to influence this decision, we do wonder if development of a binding instrument on the administrative approach, which would place significant administrative burdens on parties, is useful given the existing state of implementation of the Protocol itself among Parties. We are also concerned that the "non-binding" aspect will become a de facto binding initiative, which has the potential to be overly burdensome to all parties involved.

17. It is not apparent that representatives to Group meetings have shared information with relevant ministries within their host governments. At past meetings, interventions by delegates have not always

reflected their governments' views. We would encourage governments to provide guidance to their delegations that reflects the consensus view of all interested ministries.

¶8. Action Request: The USG would like to request FAS and ECON officers to reach out to Ministries of Agriculture, Trade and Environment to understand how each country will be represented in Mexico City, and to determine their country's positions on the issues. The draft proposal up for consideration by Parties could severely impact the global trade of biotech derived commodities due to the risk and uncertainty that could be imposed on exporters. We request immediate engagement with all relevant host Government ministries to express our concerns over this potentially grave situation and to elicit support for a more balanced proposal.

¶9. Please report on results of the demarche via cable by February 13 and slug response to USDA/FAS -Steve Froggett (steve.froggett@fas.usda.gov); OES - Danielle Wood (WoodDK@state.gov; and EEB/TPP/MTAA/ABT - Marcella Szymanski (Szymanskimb@state.gov).

¶10. Minimize considered.
CLINTON